THE GROWTH OF ADMINISTRATIVE LAW IN AMERICA. — The most striking change in the political organization of the last half century is the rapidity with which, by the sheer pressure of events, the state has been driven to assume a positive character. We talk less and less in the restrained terms of nineteenth-century individualism. The absence of governmental interference has ceased to seem the ultimate ideal. There is everywhere almost anxiety for the extension of governmental functions. It is inevitable that such an evolution should involve a change in the judicial process. The administrative departments, in the conduct of public business, find it essential to assume duties of a judicial character. Where, for example, great problems like those involved in government insurance are concerned, there is a great convenience in leaving their interpretation to the officials who are to administer the act. They have gained in its application an expert character to which no purely judicial body can pretend; and their opinion has a weight which no community can afford to neglect. The business of the state, in fact, is so much like private business that, as Professor Dicey has emphasized,[1] its officials need "that freedom of action necessarily possessed by every private person in the management of his own personal concerns." So much is at least tolerably clear. But history suggests that the relation of such executive justice to the slow infiltration of a bureaucratic regime is perilously close; and the development of administrative law needs at each step to be closely scrutinized in the interests of public liberty.[2] The famous Arlidge Case in England [3] is a striking example of what the seventeenth century would have termed star-chamber methods. It was there decided by the highest English tribunal that when a government department assumes quasi-judicial functions, the absence of express injunction in the enabling statute means that the department is free to embark upon what procedural practice may seem best to it; nor will the courts inquire if such practice results, or can by its nature, result in justice. In such an attitude, it is clear that what Professor Dicey has taught us to understand as the rule of law [4] becomes largely obsolete. If, as in the Zadig Case,[5] the Secretary of State may make regulations of any kind without any judicial tests of fairness or reasonableness being involved, it is clear that a fundamental safeguard upon English liberties has disappeared. Immediately administrative action can escape the review of the courts, it is clear that the position of a public official has become privileged in a sense from which the administrative law of France and Germany is only beginning to escape. Nor is it likely that these issues have become significant merely in relation to abnormal conditions. American administrative law, in the sense of a law different in content from a mere law of public officers, goes back to the Ju Toy Case [6] where a majority of the Supreme Court, perhaps somewhat doubt-

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[1] 31 L. QUART. REV., 150.

[2] *Cf.* Pound, Address to the New Hampshire Bar Association, June 30, 1917.

[3] [1915] A. C. 120, and *cf.* Dean Pound's comment in the address cited above.

[4] THE LAW OF THE CONSTITUTION [8 ed.], 179 *f.* It is interesting that as late as 1914 Professor Dicey still retained his belief in the absence from England of any *Droit Administratif.* In 1915 he was already discussing its development.

[5] R. *v.* Halliday, [1917] A. C. 266. *Cf.* especially the dissenting opinion of Lord Shaw and *cf.* 31 HARV. L. REV. 296.

[6] United States *v.* Ju Toy, 198 U. S. 253.

fully, held the courts powerless, in view of the Chinese Exclusion Act of 1894, to review a decision of the Secretary of Commerce and Labor. But no one would object to action by a government department so long as assurance could be had of absolute fairness in the methods by which a decision was reached; it was exactly the absence of those methods which constituted the source of grievance and disquiet in the Arlidge Case. A recent decision of the Supreme Court,[7] very strikingly comparable with the issue in the English case, suggests that the Supreme Court will be careful of these safeguards, as, indeed, the due-process clause obviously demands it must be careful. The Public Service Commission of New York ordered a gas company, after a hearing in which witnesses were cross-examined, testimony introduced, and the case argued, to provide gas service to a certain district. The company believed that, relative to the expenditure required, a sufficient return would not be had. It therefore appealed on the ground that the order of the commission "was illegal and void in that it deprived the Gas Company of its property without due process of law and denied to it the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States . . ."; and after the requisite intermediate stages the issue came before the Supreme Court on this single ground of error. Mr. Justice Clarke upheld the action of the Public Service Commission. He admitted, for the court, that the finding of an expert body such as the commission is final and will not be discussed again by the courts. Such, of course, has been the general practice of the Supreme Court; [8] and, so far, the decision in no sense differs from the bearing of the opinion rendered in the Arlidge Case by the House of Lords. But there is at this point a significant departure. "This Court," says Clarke, J.,[9] "will nevertheless enter upon such an examination of the record as may be necessary to determine whether the federal constitutional right claimed has been denied, as, in this case, whether there was such a want of hearing, or such arbitrary or capricious action on the part of the Commission as to violate the due-process clause of the Constitution." No one, it may be suggested, who studies the history of the due-process clause can deny that, on occasion, it has been sadly perverted from its original purposes. But here at least, and in the perspective here outlined, its value must be obvious even to those who are suspicious of the rigidity of a written constitution. The Supreme Court, as the learned judge points out, does not propose to go into issues probably better settled by the administrative tribunal; but it does, and rightly, propose to examine into the fundamental questions of whether the means taken by that tribunal to attain its end were such as were, on the plain face of it, adequate to the securing of justice. That, of a certainty, is a safeguard to which the courts will more and more be driven with the expansion of administrative law. Under the Defense of the Realm Consolidation Act,[10] for instance, the Secretary of State has just issued a regulation which prohibits publica-

[7] New York *v.* Public Service Commission, 38 Sup. Ct. Rep. 122.

[8] Baltimore & Ohio R. R. Co. *v.* Pitcairn Coal Co., 215 U. S. 481; Interstate Commerce Commission *v.* Union Pac. R. R. Co., 222 U. S. 541.

[9] New York *v.* McCall *et al.*, 38 Sup. Ct. Rep. 122, 124.

[10] 5 GEO. V, c. 8.

tion of any pamphlet or book relating to the conduct of the war or the terms of peace without its previous submission to the censor who may prohibit such publication without the assignment of cause.[11] That is to say that the merest and irresponsible caprice of a junior clerk may actually be the occasion of suppressing a fundamental contribution to our understanding of the war. So ridiculous a proceeding is at least prevented by this decision. It would have to be shown to the Supreme Court that the methods taken to secure the decision were such as to warrant it; and in so vital a thing as freedom of speech one may feel tolerably certain that the methods would be subject to close scrutiny. It has been the habit of past years to sneer rather elaborately at Bills of Rights. It may be suggested that, with the great increase of state activity which is clearly foreshadowed, there was never a time when their value will have been so manifest. The human needs that history has demonstrated to be essential must be put beyond the control of any organ of the state; that, and no more than that, is what we mean today by natural rights.[12] Governmental power is a thing which needs at every stage the most careful regard; and it is only by judicial control in terms of those rights that the path of administration will become also the path of justice.

THE EXTRATERRITORIAL FORCE OF A DECREE BY A COURT OF EQUITY.[1] — Though a court of equity having the person of the defendant before it might conceivably order him to act in any way it might see fit, and punish him for failure to comply with the decree, this power is not under the settled rules of the conflict of laws, pushed to the extent of interfering with the laws or property of a foreign sovereign.

There is no interference, however, where the order is to refrain from action in a foreign jurisdiction by an injunction against either the commission of a foreign tort,[2] or the breach of a contract in foreign territory.[3] But relief in such cases has frequently been denied on the ground of inexpediency.[4] Nor is there a fatal interference where the order calls for affirmative action within the territorial jurisdiction of the court issuing the order, even though compliance therewith may affect a foreign *res*. Thus a court of equity may order the defendant to account for the proceeds of foreign land,[5] or decree the conveyance of land outside its

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[11] REG. 51. *Cf.* London *Nation*, December 8, 1917.

[12] *Cf.* W. WALLACE, LECTURES AND ESSAYS, 213 *ff.*

[1] For former discussions of this problem see 23 HARV. L. REV. 390; and Beale, "The Jurisdiction of Courts over Foreigners," 26 HARV. L. REV. 283, 294.

[2] Alexander *v.* Tolleston Club, 110 Ill. 65; French *v.* Maguire, 55 How. Pr. (N. Y.) 471; Frank *v.* Peyton, 82 Ky. 150.

[3] Western Union Tel. Co. *v.* Pittsburg, C. C. & St. L. Ry., 137 Fed. 435; Schofield *v.* Ry., 43 Ohio St. 571, 3 N. E. 907.

[4] No. Ind. Ry. Co. *v.* Mich. Central Ry., 15 How. (U. S.) 233 (Foreign tort); Delaware L. & W. Ry. Co. *v.* New York S. W. Ry., 12 Misc. (N. Y.) 230 (Breach of contract in foreign territory).

[5] Edwards *v.* Ballard, 14 La. Ann. 362; Sullivan *v.* Kenney, 148 Iowa, 361; 126 N. W. 349.